

Tran (Migration) [2023] AATA 3721 (22 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Van Chau Tran
VISA APPLICANTS:	Ms Thi Min Nguyen Mr Quang Truong Nguyen
REPRESENTATIVE:	Dr Ngo Tung Bao (MARN: 0006620)
CASE NUMBER:	2005147
DIBP REFERENCE(S):	BCC2019/1375070
MEMBER:	Brygyda Maiden
DATE:	22 October 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 22 October 2023 at 1:06pm

CATCHWORDS

MIGRATION –Partner (Provisional) (Class UF) visa - subclass 309 – review applicant not knowing the name of the venue of the parties’ wedding party – concern about the genuineness of the parties’ relationship – little evidence to suggest that the parties continue to represent themselves to other people as being married to each other – no evidence of the parties living together when the review applicant travels to Vietnam – genuine concerns about the review applicant being a credible witness — not satisfied that the review and visa applicant have a commitment to each other consistent with a genuine and continuing relationship at the time of application or of this decision— decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 309.211, 309.221

CASES

Minister for Immigration and Ethnic Affairs v Pochi (1980) 4 ALD 139
Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 9 March 2020 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s 65 of the *Migration Act 1958* (Cth) (the "Act").
2. The first named visa applicant, a 45-year-old Vietnamese national (the "visa applicant") and the secondary visa applicant, a 20-year-old Vietnamese national (and the son of the visa applicant) applied for the visa on 18 March 2019 on the basis of their relationship with their 69-year-old sponsor, (the "review applicant"). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the "Regulations"). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need only satisfy the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211(2) of the Regulations. The delegate considered that all the information and evidence provided in support of the application including the matters in reg 1.15A were not sufficient to demonstrate that the visa applicant was the spouse as defined under s 5F of the Act of a person who is an Australian citizen, Australian permanent resident or eligible New Zealand citizen.
4. The review applicant applied to the Tribunal for review on 15 March 2020 and attached a copy of the notification and decision from the Department.
5. On 23 April 2023, an officer of the Registrar of the Tribunal wrote to the review applicant through his representative requesting further information and supporting evidence in relation to the circumstances of the parties' relationship and provided examples of the types of information that could be submitted. The review applicant was given until 10 May 2023 to respond. On 10 May 2023, the representative in his submissions submitted further money transfers.
6. The review applicant appeared before the Tribunal on 26 September 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by video conference.
7. The review applicant was represented in relation to the review, there was no contradictor present and the Tribunal was assisted by an interpreter in the Vietnamese and English languages. At the hearing, the parties indicated that they could understand the interpreter and had no objections to using the interpreter.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the visa applicant is the spouse or de facto partner, as defined in the Act, of the review applicant.
10. At the very end of the hearing, the representative stated that he had difficulty working with the review applicant due to his poor memory. Sometimes he would say one thing and then he would say another. No medical evidence has been submitted in relation to any memory

issues pertaining to the review applicant, and the Tribunal gives the representative's claim little weight.

11. Are the parties in a spouse or de facto relationship?

12. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal's decision: cl 309.221. In the present case, the visa applicant claims to be the spouse of the review applicant who is an Australian citizen. A copy of his certificate of Australian citizenship and the bio pages of his Australian passport appear on the Department file.
13. "Spouse" is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

14. The visa applicant's "Letter of report on the marital relationship" translated on 18 March 2019 on the Department file states that the parties met through the visa applicant's former sister's (Ms Nguyen Thi Tan) family. The review applicant had been a family friend. He attended a party at Ms Nguyen Thi Tan's house and saw a photograph of the visa applicant. Ms Nguyen Thi Tan introduced the parties. The review applicant came to Vietnam with friends to visit relatives and to meet the visa applicant for the first time (a copy of the review applicant's passport indicates he entered Vietnam on 2 April 2018 and departed on 19 April 2018). The visa applicant took a flight on 2 April 2018 from Hai Phong City to Ho Chi Minh City in order to meet the review applicant at Tan Son Nhat Airport. The parties had a meal at the visa applicant's aunt's house where she was living on 5 April 2018. On 6 April 2018, the review applicant invited her "aunt family" and the visa applicant to introduce the visa applicant to his relatives as his girlfriend. The review applicant returned to Australia on 19 April 2018 and the parties kept in touch by Viber and the parties feelings for each other grew. On 6 September 2018, the review applicant and his son arrived in Vietnam to prepare for the parties' wedding. The visa applicant together with the review applicant's two younger brothers went to Tan Son Nhat Airport to collect them. The parties celebrated their wedding on 15 September 2018 at O Cap restaurant "belonging to I Cap Tourism and Event Services Co LTD" (Vung Tau City, Vietnam) (and the photographs submitted of the wedding party have a narration which indicates that it occurred at O Cap restaurant, on 15 September 2018). The visa applicant's mother, her children and sisters and brother and relatives attended (at the hearing the review applicant also told the Tribunal that his daughter did not attend as she was doing a course for nursing and was busy). The review applicant's son and his sisters, brother and relatives also attended. His mother was too elderly to come and his siblings who resided in America and Canada also did not come but called to give the parties their well wishes. After the parties' wedding ceremony, the parties lived in the review applicant's brother's house in Vung Tau. On 6 October 2018, the parties flew to Hai Phong

City to visit the review applicant's family and also registered their marriage certificate there. The certificate was issued on 11 October 2018. On 26 October 2018, the review applicant returned to Australia, but kept in touch with the visa applicant daily through Viber.

15. At the hearing, the review applicant told the Tribunal that he had forgotten the name of the restaurant where the parties were married. His brothers and cousins had booked it. He thought it was something like "Sam Bo", and it was not a Vietnamese name. The Tribunal indicated that a wedding is a significant part of relationship and was concerned that the review applicant could not recall where the wedding party was held. The review applicant stated that it had been a long time, he did not take a lot of notice and that he was illiterate and could neither read nor write Vietnamese or English (no evidence was submitted in support of this claim). However, it seems from the review applicant's initial evidence that despite being claiming to be illiterate, he had known the name of the wedding party venue and now forgotten. The Tribunal considers it reasonable that parties in a genuine and continuing relationship remember the name of their wedding venue as generally a wedding is considered an important relationship milestone.
16. When asked what colour dress the visa applicant wore to the wedding party, the review applicant stated red and that she then changed back into plain clothing, but in the artistic photographs in the park she wore a white dress. The Tribunal indicated that the wedding photographs that had been submitted (which were in a bundle labelled select photographs of wedding party) indicate that in addition to a red dress she also wore a formal cream / gold dress. The review applicant stated that photograph was taken before the wedding day at the park. This was not consistent with the photographs submitted which show the parties at the wedding party rather than at the park. The Tribunal showed the photographs to the review applicant at the hearing. The review applicant indicated that it was a long time ago and he could not remember. The Tribunal indicated that it would have expected that he would remember the dresses that the visa applicant wore to the wedding. This, together with the review applicant not knowing the name of the venue of the parties' wedding party, causes the Tribunal concern about the genuineness of the parties' relationship.
17. The review applicant's translated "Letter of report on the former relationship" dated 26 October 2018 on the Department file indicates that the review applicant has two children (Johnny Nguyen born June 1997 and Tina Tran born June 1998) with Nguyen Thi Thao, who he did not marry but was in a relationship with and lived with from 1994. Their relationship ended in 2002 and the review applicant raised the children. In April 2005, he married Thi Thanh Huong Nguyen. He sponsored her and her daughter to come to Australia. They separated in 2009, and from that moment, the review applicant did not contact her or know her residence. After meeting up with Thi Thanh Huong Nguyen's sister, he got in touch with his ex-wife and divorced her on 19 May 2018. They did not have any children together. A copy of the divorce order also appears on the Department file.
18. The visa applicant's statement letter dated 25 October 2018 on the Department file indicates that the visa applicant was married to Nguyen Van Tho in October 2001 who passed away on 16 January 2004. They had a child together (the secondary visa applicant).
19. A death certificate for Mr Nguyen Van Tho appears on the Department file which indicates his date of death on 16 January 2004, but the death seemingly was not registered until over 10 years later on 6 June 2015, which the Tribunal considers strange.
20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. A copy of a translated Vietnamese marriage certificate appears on the Department file indicating that the parties' marriage was registered on 11 October 2018. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a). However, this evidence

alone does not in the Tribunal's view demonstrate a mutual commitment to a shared life together or a relationship that is genuine and continuing.

Are the other requirements for a spouse relationship met?

21. *Financial aspects of the relationship*

22. The Tribunal has considered the financial aspects of the relationship, including any joint ownership of real estate or other major assets; joint liabilities; the extent of any pooling of financial resources; whether one person in the relationship owes any legal obligations in respect of the other, and the basis of any sharing of day-to-day household expenses.
23. The review applicant gave evidence that he received a pension and had not worked for the last 10 years due to his asthma. After he collapsed at work, his previous employer, a lawn mower company, Honda, called an ambulance and he was laid off after the incident. He would not qualify for heavy work and cannot lift anything heavier than five kilograms. The visa applicant gave evidence that the review applicant had retired and prior to retiring that he used to work on a farm. He also used to work at a company but she did not know the name, as he was already retired. The Tribunal accepts this evidence given that the review applicant has not worked for 10 years.
24. The review applicant told the Tribunal that the visa applicant works in a supermarket as a store person or accountant and she receives or distributes goods. He did not know the name of the supermarket as he had never been there. The Tribunal expressed its surprise that he did not know the name of where the visa applicant worked, to which he answered that the visa applicant had never told him and he had never asked. The Tribunal is concerned that the review applicant has limited knowledge of the visa applicant's personal circumstances in terms of how she earns and income (he gave two potential possibilities) or where she works and the Tribunal finds this not indicative of the parties being in a genuine and continuing relationship.

25. Do the parties have any joint ownership of real estate or other major assets or any joint liabilities or any pooling of financial resources or does one person in the relationship owe any legal obligations in respect of the other?

26. At the time of application and the time of decision, there is no evidence before the Tribunal that: the parties had any joint ownership of real estate or other major assets or any joint liabilities or any pooling of financial resources or that one person in the relationship owes any legal obligations in respect of the other.

27. What is the basis of any sharing of day-to-day household expenses?

28. The "Application for migration to Australia by a partner" form on the Department file generated on 18 March 2019 states that the review applicant has provided the visa applicant with financial support by sending money to cover part of her living expenses and the costs of the secondary visa applicant's study (which was consistent with the visa applicant's oral evidence at hearing). When the parties are together, the review applicant supports the visa applicant and pays all meal expenses and he paid for costs related to the wedding. Copies of a small number of money transfer receipts from December 2018 until October 2019 appear on the Department file.
29. The representative's submissions dated 1 August 2022 indicate that the sponsor has transferred \$12,700 to the visa applicant to support her and the secondary visa applicant. Samples of copies of a number of money transfers from 22 December 2018 until 12 May 2020 were submitted. The representative made another submission dated 10 May 2023,

with attached copies of additional money transfers from 24 October 2022 until 11 April 2023 totalling an additional \$1,750. The representative's submissions dated 27 September 2023, with attached call records, had dispersed amongst them numerous money transfers ranging from \$200 to \$400 between 2020 and 2022. The Tribunal accepts that the review applicant has regularly sent money to the visa applicant.

30. The review applicant told the Tribunal that the parties do not share gas, electricity, water and household expenses as the visa applicant lives in Vietnam and he lives in Australia. She takes care of herself and he takes care of himself. The Tribunal accepts this evidence. When the visa applicant needs money she calls him and he sends it to her. However, he was not exactly sure what she would spend the money he sent on: dentistry, buying an air conditioner or something like that. Given the amount of money that the review applicant has sent to the visa applicant, the Tribunal finds it surprising that the review applicant was not really sure what the visa applicant uses the money for. It also appears strange to the Tribunal, that the review applicant appears not know that according to the visa applicant that he is also funding the review applicant's study given he is the secondary visa applicant's stepfather.

31. *Conclusion as to the financial aspects of the relationship*

32. In relation to the financial aspects of the relationship at the time of application and time of decision, the parties have no joint ownership of real estate or other major assets; no joint liabilities; there is no pooling of financial resources; no party owes any legal obligations to the other party; and because the parties continue to live in separate countries, Australia and Vietnam, there is no sharing of day-to-day household expenses. The Tribunal notes that given the parties reside in separate countries, the financial aspects of the parties' relationship would be difficult to establish, and for this reason, the Tribunal has afforded this consideration neutral weight at both the time of application and time of decision.
33. However, since prior to the time of application, the review applicant has sent regular money transfers to the visa applicant, and the Tribunal gives this some weight. Although the visa applicant claims to use the money sent for day-to-day household expenses and tuition for the secondary visa applicant, the review applicant was not really sure what she used the money for, which the Tribunal considers strange given the frequency during which the parties claim to communicate (discussed below), the amount and duration of time over which he has sent the visa applicant money and given that he is the stepfather of the secondary visa applicant. The Tribunal does not consider this to be consistent with the parties' being in a genuine and continuing relationship.

34. *Nature of the household*

35. The Tribunal has considered evidence of the nature of the parties' household, including any joint responsibility for the care and support of children, the living arrangements of the persons, and any sharing of the responsibility of housework.

36. *Is there any joint responsibility for the care and support of children?*

37. The review applicant told the Tribunal that he did not know the name of the high school that the secondary visa applicant had attended or where he was currently studying his maritime course. The Tribunal expressed its concerns about the review applicant not knowing where his stepson, the secondary visa applicant, studied. He stated that he did not ask what school the secondary visa applicant attended and he did not know. He did not have a chance to speak to the secondary visa applicant as he mostly contacted the visa applicant. He stated that the secondary visa applicant did not show much affection towards him, did not speak to him much and was cold towards him, however, despite this, the review applicant

still considers him to be like his own son and has affection towards him. A child is generally one of the most important people in a person's life. The secondary visa applicant is the visa applicant's child, and the review applicant's stepson, and he claims to consider him to be like his own son. Given the parties claim to speak regularly by Viber, the Tribunal queried whether the visa applicant told him about where the secondary visa applicant studied, to which he answered that she had and he could not remember. The Tribunal considers that the review applicant's evidence about his feelings about the secondary visa applicant as like his own son are not consistent with him not knowing where the secondary visa applicant studies, and therefore, the Tribunal has concerns about this evidence and the review applicant's claims.

38. Although the visa applicant testified that she used the money the review applicant sent her for tuition for her secondary visa applicant, this did not appear to be the intention of the review applicant who did not seem to know what the visa applicant spent the money he sent her on. Additionally, the review applicant's evidence was that the parties did not have any children of their own and did not have any joint responsibility for the care and support of any children. He takes care of his children from a previous relationship and the visa applicant takes care of her children from a previous relationship. The Tribunal finds that there is no joint responsibility for the care and support of any children.

39. *What are the living arrangements of the persons?*

40. The "Application for migration to Australia by a partner" form on the Department file generated on 18 March 2019 indicates that at that time, the review applicant lived Nam Hai Street, Group 4, Nam Hai Ward, Hai An District in Hai Phong, Vietnam. It also stated that the review applicant lived at Prince Street, Sunshine North in Victoria, Australia. The review applicant could not recall his street name at the hearing but recalled the street number and the suburb and stated that he lived with his children. The parties gave consistent evidence that the visa applicant lived with the secondary visa applicant. When asked where the visa applicant had lived at the time of application, he stated that he had been to the property but not inside and did not state her address despite being asked.
41. The representative's submissions dated 1 August 2022 indicates that the visa applicant continues to live in the same property with the secondary visa applicant and the review applicant lives at the same address with both his children. The review applicant stated that during COVID-19 the visa applicant moved to a new house and lives with the secondary visa applicant on the second floor of a house built on her mother's land. He did not know the address but had it written down. He claimed that he did not know the address because he cannot read. The Tribunal stated that it was surprised that the visa applicant had not told him what her address was and he claimed that she had but he had forgotten. Therefore, the Tribunal does not accept that the review applicant does not know where the visa applicant lives because he cannot read. The Tribunal finds it reasonable that spouses in genuine relationships know each other's current address, and therefore, the Tribunal has concerns about the genuineness of the parties' relationship.
42. On 27 April 2023, the representative on behalf of the review applicant submitted a "Change of Contact Details – MR Division" form which shows his new residential address as 9 Yaralla Crescent, Sunshine West, Victoria. The review applicant testified that he lived with his two children in West Sunshine where he moved about a year ago. He knew the street number but not the name. The visa applicant gave generally consistent evidence, in that she could remember the street number but not the street name, that he lived in Sunshine, and that he lived with his children. Given that the review applicant did not appear to know his street name, the Tribunal does not attach any adverse weight to the visa applicant not knowing the street name.

43. *Is there sharing of the responsibility of housework?*

44. The representative's submissions dated 1 August 2022 indicate that during the review applicant's stays in Vietnam, the parties shared housework. The parties gave generally consistent evidence at hearing, with the review applicant saying that the visa applicant helped with housework and the parties shopped and cooked meals together, and the visa applicant saying that the parties cooked, cleaned and washed together.

45. *Conclusion on the nature of the household*

46. At the time of application and time of decision, the parties do not have any joint responsibility for the care and support of children, the parties live in Vietnam and Australia with their respective children, and there is some evidence that they have shared the responsibility of housework when the review applicant had travelled to Vietnam to be with the visa applicant. Given the parties have for the most part lived in separate countries for the entirety of their relationship, the Tribunal accepts the difficulty with establishing a joint household, and for these reasons, the Tribunal gives the nature of the parties' household neutral weight. The Tribunal has already discussed its concerns about the review applicant's evidence about not knowing the address of where the visa applicant currently lives.

47. *Social aspects of the relationship*

48. The Tribunal has considered evidence of the social aspects of the relationship, including whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship, and any basis on which the persons plan and undertake joint social activities.

49. *Do the persons represent themselves to other people as being married to each other and what is the opinion of the persons' friends and acquaintances about the nature of their relationship?*

50. The Department file contains photographs of the parties in wedding attire at various locations, and photographs of what appears to be the parties in wedding attire having a wedding celebration in front a number of guests. The representative also submitted photographs on 1 August 2022 of the parties' wedding party. The Tribunal gives this weight.

51. The Department file contains Form 888 statutory declarations from:

- a. Mr Do Vu, dated 2 November 2018. At the time of the statement, Mr Vu knew the review applicant for 10 years. He had at that stage known the visa applicant for 18 years as her former husband was his wife's sibling. Mr Vu's wife tells him about how she and the visa applicant talk fondly regarding the review applicant. He knows the review applicant went to Vietnam in 2018 to meet the visa applicant in person and fell in love with her. Mr Vu has spoken to the review applicant about how he wanted to marry the visa applicant and start a family together. At the time of this statement, the parties' marriage had already been registered. The Tribunal gives this little weight about the parties representing themselves to others as being married to each other. As the statement does not provide much insight as to the nature of the parties' relationship, the Tribunal affords it a small amount of weight as to the opinion of the persons' friends and acquaintances about the nature of their relationship.
- b. Mr Tan Si Doan, dated 31 October 2018. At the time of the statement, Mr Doan knew the review applicant for over 20 years as he is his best friend.

The review applicant has told him how much he loves the visa applicant and wants to marry her. Mr Doan has spoken to the visa applicant over the phone and met her in person in Vietnam in April 2018. After the parties met face-to-face in April 2018, their relationship grew much stronger. He believes the parties *“are in love with each other and together they will build a strong, solid and loving happy family. They have a traditional wedding in September 2018.”* The Tribunal gives this some weight of the parties representing themselves to other people as being married to each other, and as it provides only a small amount of insight as to the nature of the parties’ relationship. The Tribunal affords it a small amount of weight as to the opinion of the persons’ friends and acquaintances about the nature of their relationship.

52. The Department file contains travel itineraries/receipts for the review applicant indicating that he travelled from Melbourne to Ho Chi Minh City on 6 September 2018 and departed to return to Melbourne on 2 October 2018. Another itinerary receipt from Vietnam Airlines indicates that he departed Ho Chi Minh City on 26 October 2018. Another itinerary/receipt indicates he departed Melbourne on 19 November 2019 and travelled to Catbi, Haiphong, Vietnam, and departed Catbi, Haiphong, on 29 November 2019 and arrived in Melbourne on 3 December 2019 via Ho Chi Minh City.
53. The Tribunal indicated to the review applicant that there was limited evidence about the parties currently representing themselves as being married and little evidence since the delegate’s decision in relation to the opinion of friends and acquaintances about the nature of the parties’ relationship. The review applicant stated that they represent themselves as a couple, and everywhere they go they take photographs as a couple including while they shopped together. He stated that he had a lot of friends that know the parties and attended their wedding but he had not told his representative that. He then mentioned that he has two very close friends who know about his relationship being Mr Do Vu and Mr Tan Si Doan, and the Tribunal indicated it had seen statements from them (on the Department file). The Tribunal notes that no further evidence was submitted post hearing despite chat records being submitted post hearing.
54. *Is there any basis on which the persons plan and undertake joint social activities?*
55. The Department file has numerous photographs of the parties together in the airport, burning incense for the visa applicant’s father at her mother’s house, burning incense for the review applicant’s father at his brother’s house, the parties and the secondary visa applicant, the parties having meals with others, the parties at various locations together and with others including, for example, at karaoke.
56. The representative’s written submissions dated 1 August 2022 contains selections of photographs of the review applicant’s:
 - a. first trip to Vietnam from 2 to 19 April 2018, including with family, and there are many photographs of the parties dining with others;
 - b. trip to Vietnam from 6 September 2018 until 26 October 2018 which show the parties in bed together and at various other locations, including with family members, the parties in wedding attire, a small reception in front of family of both sides, and at various other places;
 - c. trip to Vietnam from 27 April 2022 until 26 May 2022 which show the parties together and with others at various locations.

57. The submissions indicate that there was also a trip to Vietnam from 19 November 2019 to 4 December 2019, and there was a period of time during which the review applicant could not travel to Vietnam due to the COVID-19 pandemic travel restrictions. The Tribunal does not attach any adverse weight to the parties not seeing each other during the pandemic. The Tribunal accepts that there is some evidence as to the basis on which the parties plan and undertake social activities, and the Tribunal gives this some weight.

58. *Conclusion on the social aspects of the relationship*

59. At the time of application, there is evidence that the parties represent themselves to other people as being married to each other, there are two opinions of the persons' friends and acquaintances about the nature of the relationship, and there is evidence that the parties plan and undertake joint social activities. The Tribunal gives the social aspects some weight in support of the parties being in a genuine and continuing relationship.
60. At the time of decision, other than the wedding photographs and the statements on the Department file, there is little evidence to suggest that the parties continue to represent themselves to other people as being married to each other. It is not clear what the current opinion of the persons' friends and acquaintances is about the nature of the relationship, as the last statements were submitted to the Department in 2018. There is evidence that the parties undertook joint social activities when the review applicant travelled to Vietnam. Although there is some evidence as to the social aspects of the parties' relationship, it is not in the Tribunal's view consistent with the parties being in a genuine and continuing relationship.

61. *Nature of the persons' commitment to each other*

62. The Tribunal has considered evidence of the nature of the persons' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long-term one.

63. *What is the duration of the relationship?*

64. The review applicant could not remember when his relationship with the visa applicant started and he said the duration was more than four or five years. The Tribunal notes that the parties have been married since 11 October 2018. The Tribunal notes that the visa applicant's "Letter of report on the marital relationship" translated on 18 March 2019 on the Department file states that the parties feelings started to grow when the review applicant returned to Australia on 19 April 2018. At the time of application, the parties had been in a relationship for under a year and married for under six months. The Tribunal gives this a small amount of weight. At the time of decision, the parties have been in a relation and married for over five years. The Tribunal gives this weight.

65. *What is the length of time the parties have lived together?*

66. The review applicant told the Tribunal that the last time he saw the visa applicant in person was 1.5 years ago in 2022 between April and May 2022. The review applicant stated he planned to see the visa applicant as soon as possible after the hearing but had not booked tickets as he was gathering his finances and would then arrange and book tickets. He needs between \$7,000 and \$8,000 for the trip and he needs to ensure he has enough finances due to the expense all of which he bears. The Tribunal accepts this evidence.
67. The parties gave consistent evidence that when the review applicant travels to Vietnam, the parties stayed together, regardless of where they were in North or South Vietnam. The

review applicant clarified that the visa applicant follows him to South Vietnam and when he goes to North Vietnam they go to her home town. Although the review applicant submitted photographs of the parties together in Vietnam (and the Tribunal accepts that the parties' socialised together), the Tribunal does not accept that the photographs indicate that the parties lived together. Other than the parties' claims, there is no other evidence that the parties' lived together when the review applicant travels to Vietnam, and for the reasons already outlined, the Tribunal gives the parties living together a small amount of weight.

68. *What is the degree of companionship and emotional support that the persons draw from each other?*

69. The Department file contains chat records between April 2018 and December 2018, August 2019 and November 2019, and further chat records between March 2019 and August 2019. The records are not in English and it is not clear who they are between. Because of this, the Tribunal is unable to ascertain what degree of companionship and emotional support the parties draw from each other from the chat records and it gives them little weight.
70. The representative's submissions dated 10 May 2023 indicate that the parties have regular contact every day by Viber (the visa applicant testified that the parties contact each other every day), and that the review applicant would provide printed copies and provide them to the Tribunal "shortly". At the hearing, the review applicant provided the Tribunal with a bundle of call records from May 2018 until March 2019, and from November 2019 until March 2020. The Tribunal allowed the review applicant additional time to submit additional chat records.
71. The day after the hearing (i.e. 27 September 2023), the representative submitted additional screenshots of call records that are claimed to be from the review applicant's phone to the visa applicant from April 2020 to January 2021 and from February 2023 to May 2023. These show a combination of voice, video and missed calls. The representative's submission indicate that the screenshots are of the review applicant's phone, but it is not clear from the records submitted who the review applicant is calling or who is calling him and whether the calls are just made to and from the visa applicant or whether this is the review applicant's entire call log. It is also not clear from the records submitted what degree of companionship the parties draw from each other. For these reasons, the Tribunal gives the calls logs little weight.
72. At hearing, the parties gave consistent evidence as to each other's hobbies and interests, and the Tribunal gives this weight.
73. The review applicant told the Tribunal that the visa applicant had supported him emotionally when his hand was swollen, she took him to the hospital and took care of him when he was in pain. The visa applicant said that when the review applicant is tired she would cook him a good meal and give him a massage so he can regain his strength and be well again.
74. In terms of the review applicant providing emotional support to the visa applicant, he testified that every time he went to Vietnam the parties spent time cooking and shopping and he tries to make her happy. The Tribunal queried whether the review applicant could tell the Tribunal about a specific time when he provided the visa applicant with emotional support and he stated that the parties get along very well, never argue and never raise their voices. Her family treat him very well, they tell him he is a kind nice man and he treats them well too. The visa applicant said that when she was in a bad mood and sad, she talks to him and he gives her support emotionally (though no evidence was submitted from the visa applicant's family). He tells her to be patient and strong and they will finally live together when the time comes. The Tribunal finds that there is a small amount of evidence of emotional support that the parties draw from each other.

75. *Do the persons see the relationship as a long-term one?*

76. In terms of the parties' joint plans for the future together, the review applicant told the Tribunal that when the visa applicant arrives in Australia she will have to do an English course. He needs her to obtain some essential English so she can obtain a job. The review applicant had also mentioned earlier on in the hearing that the parties would open a joint account. He will find a school for the secondary visa applicant. The Tribunal asked whether the review applicant had looked into schools for the secondary visa applicant, to which he stated that he had not made enquiries, but when he comes he will go into Year 11 or 12. The Tribunal queried how old the secondary visa applicant was, to which he answered nearly 18. The Tribunal queried whether that age was on the Western calendar, to which he answered yes. However, the Tribunal indicated that it had other evidence before it that the secondary visa applicant was almost 20 (the review applicant via his representative submitted to the Tribunal a copy of the secondary visa applicant's passport which showed the secondary visa applicant's date of birth).
77. The Tribunal asked, given that the secondary visa applicant was in university, how he could go back to Year 11 or 12 at school. The Tribunal indicated that what the review applicant was saying lacked credibility in relation to the plans for the secondary visa applicant in Australia. The review applicant responded that if he is not able to go to school, he would take him to Centrelink. It was a guess only, and if he could not find a school then Centrelink would do it, and the same applied for the visa applicant. Centrelink would refer her to a course that she has to go to. The review applicant also said that if the secondary visa applicant went to school, he would assist in picking him up and dropping him off. The Tribunal indicated to the review applicant that it considered it unlikely, given the secondary visa applicant's age and that he was currently in university, that he would be going back to school, to which the review applicant stated that he needed to learn English. The Tribunal expressed its concern that he did not know how old the secondary visa applicant was, to which the review applicant responded that he did not count properly, his focus was on the visa applicant, and the secondary visa applicant is a very closed person. The review applicant mused that perhaps it was because he was not the secondary visa applicant's biological father that he was not open to the secondary visa applicant. The review applicant stated that he was taking care of both visa applicants. The Tribunal asked how he was taking care of the secondary visa applicant, to which the review applicant said he would show him how to live in Australia, to which the Tribunal responded that had not yet happened. The review applicant conceded that he and the secondary visa applicant did not have a lot of things to do together, and they just say hello. He is closer to the visa applicant and her siblings.
78. The visa applicant stated that the parties had discussed their plans for the future: she will need to do an English course, try and find a suitable job and the parties will live together. The parties need to be together so she can take care of the review applicant and she needs to find a job so she can contribute her salary into his life. The Tribunal gives this some weight.
79. The review applicant stated that he did not know what would happen to the parties' relationship if the visa applicant could not come to Australia. The Tribunal finds this concerning. He stated that their marriage was still intact and either he would come back to Vietnam to be with her or she would visit him in Australia. The visa applicant said that their relationship will stay the same and the review applicant would come to Vietnam to visit her and keep their marriage.
80. When the Tribunal asked if the review applicant will move to Vietnam to be with the visa applicant permanently, he said if he lives in Vietnam long-term there will not be medication for his sickness which he described as asthma. The Tribunal asked if what he was saying

was that he could not obtain asthma treatment in Vietnam, to which he said because he received a pension in Australia he can have the medication and ambulance services. The ambulance is not available in Vietnam and the health care in Vietnam is not as good as it is in Australia. The Tribunal indicated that it found it quite surprising that he could not obtain asthma medication in Vietnam, to which he said he always takes his asthma medication to Vietnam, the price of the medication is more expensive than it is in Australia and the parties have to travel for hours by car to obtain it. He stated that he was taking a number of medications, the mask, a puffer, the mixer and an inhaler. The visa applicant said that the review applicant would only move to Vietnam if his health condition allowed him to do so. No evidence was submitted in relation to the review applicant's health condition or in relation to the cost of the medication in Vietnam.

81. *Conclusion as to the nature of the parties' commitment to each other*

82. At the time of application, the parties had been in a relationship for under a year and married for under six months, although the parties claim to have lived together each time the review applicant goes to Vietnam there is no evidence to support this other than the parties' claims. Phone records were been submitted but it is not clear what degree of companionship and emotional support that the parties draw from each other. There is little evidence that the parties saw their relationship as a long-term one. There is a small amount of evidence as to the nature of the parties' commitment to each other, however, the Tribunal is not satisfied that this is consistent with the parties being in a genuine and continuing relationship.
83. At the time of decision, the parties have been in a relationship and married for over five years. Although the parties claim to have lived together each time the review applicant goes to Vietnam, there is no evidence to support this other than the parties' claims. Although many call records have been submitted, it is not clear what degree of companionship the parties draw from each other and there is some evidence of emotional support. Although there is some evidence that the parties see their relationship as a long-term one, the evidence the review applicant gave in relation to the secondary visa applicant lacks credibility given the secondary applicant's age and education history. On balance, although the Tribunal accepts that there is evidence of the nature of the parties' commitment to each other, it does not provide strong support for the parties being in a genuine and continuing relationship.
84. Middleton J stated in *Jayasinghe v MIMA* [2006] FCA 1700 at [35]:

85. This does not mean that evidence subsequent to the visa application does not need to be considered at all. Evidence of events subsequent to the visa application is relevant if it 'tends logically to show the existence or non-existence of facts relevant to the issue to be determined': see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.

86. Accordingly, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application.

CONCLUSION

87. The Tribunal is satisfied that the parties are married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

88. However, the Tribunal has afforded weight of various amounts to evidence regarding (amongst other things):
- a. the regular money transfers from the review applicant to the visa applicant;
 - b. the parties representing themselves to others as being married to each other at the time of application;
 - c. the small amount of opinion as evidence from the parties' friends and acquaintances as to the nature of the parties' relationship at the time of application;
 - d. the parties plan and undertake social activities and know each other's hobbies;
 - e. the duration of the parties' relationship exceeding five years;
 - f. the small amount of evidence in relation to the emotional support that the parties draw from each other;
 - g. the parties gave consistent evidence about the visa applicant learning English and obtaining a job if she came to Australia.
89. However, there are other matters that weigh more heavily against the relationship than those that weigh in favour of it (which have been discussed in further detail above). These include:
- a. the review applicant could not recall the name of the restaurant where the parties held their wedding party;
 - b. the review applicant's evidence about what the visa applicant wore to the wedding party in relation to her second dress was inconsistent with photographs that had been submitted and he could not recall the colour of her second dress;
 - c. the review applicant not knowing the name of the supermarket where the visa applicant works;
 - d. the review applicant not being sure what the visa applicant used the money transfers for that he sent to her;
 - e. the review applicant not knowing where the secondary visa applicant went to high school or where he was studying his maritime course;
 - f. the review applicant told the Tribunal that the secondary visa applicant was nearly 18, however, other evidence before the Tribunal indicates that he is almost 20;
 - g. although there is time of application evidence in relation to the parties representing themselves as being married, there is little evidence of this at the time of decision;
 - h. there has been no insight as to the opinion of the parties' friends and acquaintances about the nature of their relationship since 2018; and
 - i. other than the parties' claims, there is no evidence of the parties living together when the review applicant travels to Vietnam;

- j. the credibility concerns with the review applicant's evidence that he would look into schools for the secondary visa applicant when he came to Australia and the secondary visa applicant will go into Year 11 or 12, however, the secondary visa applicant has already finished high school in Vietnam and is studying a maritime course.

- 90. For these reasons and with respect to the reg 1.15A(3) matters, the Tribunal is not satisfied that, on balance, at the time of decision, the parties' relationship is genuine and continuing as required by s 5F(2)(b).

91. Conclusion

- 92. On the basis of the above, the Tribunal is not satisfied that the requirements of s 5F(2) are met at the time the visa application was made or at the time of this decision. Therefore, the visa applicant does not meet cl 309.211 and cl 309.221.
- 93. In relation to the secondary visa applicant, as the Tribunal has found that the visa applicant and the review applicant are not spouses for the purposes of the Act, the secondary visa applicant cannot meet the criteria for a Subclass 309 visa as a member of the family unit of a person who has satisfied the primary criteria.
- 94. For the reasons above, the visa applicants do not satisfy the criteria for the grant of the visas.

DECISION

- 95. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Brygyda Maiden
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).